

1  
2  
3  
4  
5  
6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA  
8

9 ALEATRICE THOMAS,

10 Plaintiff,

11 v.

12 COMMISSIONER OF SOCIAL SECURITY,

13 Defendant.

Case No. 1:20-cv-01723-SAB

ORDER REQUIRING PLAINTIFF TO  
SHOW CAUSE WHY SOCIAL SECURITY  
APPEAL SHOULD NOT BE DISMISSED  
AS UNTIMELY

FOURTEEN DAY DEADLINE

14  
15 On December 7, 2020, Aleatrice Thomas (“Plaintiff”) proceeding pro se and *in forma*  
16 *pauperis*, filed this action seeking judicial review of the denial of disability benefits pursuant to  
17 the Social Security Act. In her complaint, Plaintiff states that she received notice that her Social  
18 Security claim had been denied on September 20, 2020. (Compl. 3,<sup>1</sup> ECF No. 1.) Attached to  
19 the complaint is the appeals counsel decision denying her appeal on reconsideration, dated  
20 September 20, 2020. (*Id.* at 6-9.)

21 Generally, the United States and its agencies are entitled to sovereign immunity from suit  
22 unless Congress has expressly waived immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994);  
23 Kaiser v. Blue Cross of California, 347 F.3d 1107, 1117 (9th Cir. 2003); Hodge v. Dalton, 107  
24 F.3d 705, 707 (9th Cir. 1997). In the Social Security Act, the United States has waived  
25 sovereign immunity only for limited judicial review of the Social Security Administration’s final  
26 decisions. Mathews v. Eldridge, 424 U.S. 319, 327 (1976). Under 42 U.S.C. § 405(g), “[a]ny

27  
28 <sup>1</sup> All references to pagination of specific documents pertain to those as indicated on the upper right corners via the  
CM/ECF electronic court docketing system.

1 individual, after any final decision of the Commissioner of Social Security made after a hearing  
2 to which he was a party, irrespective of the amount in controversy, may obtain a review of such  
3 decision by a civil action commenced within **sixty days** after the mailing to him of notice of such  
4 decision or within such further time as the Commissioner of Social Security may allow.”  
5 (emphasis added.) Congress has strictly limited the Court’s jurisdiction of over Social Security  
6 actions.

7 No findings of fact or decision of the Commissioner of Social Security shall be  
8 reviewed by any person, tribunal, or governmental agency except as herein  
9 provided. No action against the United States, the Commissioner of Social  
Security, or any officer or employee thereof shall be brought under section 1331  
or 1346 of Title 28 to recover on any claim arising under this subchapter.

10 42 U.S.C. § 405(h).

11 In order for this Court to consider Plaintiff’s Social Security appeal, she must  
12 demonstrate that she has complied with the requirements of Section 405(g), including that she  
13 has received a final decision and that this action is filed “within **sixty days** after the mailing to  
14 [her] of notice of such decision” after a hearing. See 42 U.S.C. 405(g) (emphasis added).

15 In order to seek judicial review of a denial of Social Security benefits and/or disability  
16 benefits, an individual must have filed a complaint in the United States District Court within  
17 **sixty days** of receiving an adverse determination from the Appeals Council. Here, while  
18 Plaintiff met the jurisdictional requirement by receiving a final notice that her appeal was denied,  
19 it is apparent on the face of the complaint that she did not file her appeal within the time frame  
20 provided by section 405(g). The requirement that any appeal of the final decision be filed within  
21 sixty days is a period of limitations and may be subject to equitable tolling. Bowen v. City of  
22 New York, 476 U.S. 467, 478, 480 (1986); Vernon v. Heckler, 811 F.2d 1274, 1277 (9th Cir.  
23 1987).

24 Plaintiff’s Social Security application was denied on reconsideration on September 20,  
25 2020, and she was advised in the notice that she had sixty days to file a civil action requesting  
26 court review. (ECF No. 1 at 6-7.) Under the Social Security regulations, “ ‘[m]ailing is  
27 construed as the date of receipt of the notice, which is presumed to occur five days after the date  
28 of the notice[,]’” Vernon, 811 F.2d at 1277 (quoting 20 C.F.R. § 422.210(c)), and Plaintiff was

1 advised of such in the September 20, 2020 notice. Further, the time frame to file any appeal of  
2 the final decision "may be extended by the Appeals Council upon a showing of good cause." 20  
3 C.F.R. § 422.210(c). The notice advised Plaintiff that if she was unable to file an appeal within  
4 sixty days she could ask the Appeals Council to extend her time to file. (ECF no. 1 at 7.)

5 Plaintiff states in her complaint that she received the notice that the Commissioner's  
6 decision was final on September 20, 2020. (Compl. at 3.) Allowing for the five days from the  
7 date of the notice for mailing, Plaintiff was required to file her complaint in the district court on  
8 or before November 24, 2020. Plaintiff did not file her complaint in this action until December  
9 7, 2020, thirteen days after the limitations period had expired and has not alleged that she  
10 received an extension of time from the Appeals Council to seek judicial review of the final  
11 decision. Therefore, it appears from the face of Plaintiff's complaint that this action was  
12 untimely filed and should be dismissed.

13 Accordingly, IT IS HEREBY ORDERED THAT, within **fourteen (14) days** of the date  
14 of service of this order, Plaintiff shall show cause in writing why this action should not be  
15 dismissed as untimely filed.

16  
17 IT IS SO ORDERED.  
18 Dated: January 13, 2021

  
UNITED STATES MAGISTRATE JUDGE

19  
20  
21  
22  
23  
24  
25  
26  
27  
28